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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NORMAN'S COUNTRY MARKET, INC.,
DAVID A. NORMAN and INDIA A. NORMAN,

Petitioners,

vs.

WILLIAM E. BROCK, Secretary of Labor,
United States Department of Labor,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Questions Presented

1. Whether an employer's liability under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, may be established by conclusions stated in the investigation report of a Department of Labor compliance officer when the names of the witnesses upon whose testimony the findings were purportedly based were not disclosed and the evidence admitted at trial contradicted the conclusions stated in the report.

2. Whether the executive exemption to the Fair Labor Standards Act, 29 U.S.C. § 213, is applicable only when an employer can prove that the employees in question are engaged in managerial duties for a majority of their working hours.[1]

[1] All parties are listed in the caption. Petitioner Norman's Country Market, Inc. has no parent, subsidiaries, or affiliates.

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Norman's Country Market, Inc., David A. Norman and India A. Norman ("Normans" or "Petitioners"), by their attorneys Vedder, Price, Kaufman, Kammholz & Day, hereby petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

Opinions Below

The opinion of the Court of Appeals (Appendix, A-26)[2] is reported at 835 F.2d 823 (11th Cir. 1988), and 28 Wage & Hour

[2] hereinafter "App., ____"

Cas. (BNA) 704 (11th Cir. 1988). The opinion of the District Court for the Northern District of Florida (App., A-1) is reported at 27 Wage & Hour Cas. (BNA) 1497 (N.D. Fla. 1986).

Jurisdiction

The judgment of the Court of Appeals for the Eleventh Circuit was made and entered on January 15, 1988. An order of the Eleventh Circuit denying rehearing was made and entered on February 18, 1988.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Statutes, Constitutional Provisions and Regulations Involved

Pertinent sections of the United States Constitution, the United States Code and the Code of Federal Regulations are set forth in the Appendix at p. A-39.

Statement

1. Under a consent judgment entered by the district court in the Northern District of Florida on September 14, 1982, petitioners, David and India Norman and Norman's Country Market, Inc. (hereinafter collectively "petitioners" or "Normans"), agreed to pay a total of $31,458.86 in back wages to a group of 41 employees for overtime wages allegedly not paid pursuant to the requirements of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.* (hereinafter "FLSA" or the "Act") and to refrain from future violations of the Act.

On December 9, 1985, the Secretary of Labor (hereinafter the "government") petitioned the district court for adjudication in civil contempt and enlargement of the judgment entered pursuant to the consent decree alleging, in pertinent part, that the petitioners improperly classified eight employees as department managers and thereby failed to pay them required overtime wages at time and one half, failed to keep adequate or accurate records of the hours worked by employees subject to the overtime wage provisions of the Act, and failed to pay overtime wages to several employees whom they knew to be working "off the clock". The

case was heard on March 12, 1987, in the United States District Court, Northern District of Florida, Gainesville Division.

On October 1, 1986, the district court entered judgment sustaining, in pertinent part, the government's allegations except as to the employment status of one person, and otherwise holding petitioners in civil contempt and directing the payment of back wages, interest, liquidated damages and attorney's fees.

On January 15, 1988, a three judge panel of the United States Court of Appeals for the Eleventh Circuit, in an opinion written by the Hon. Reynaldo Garza of the Fifth Circuit sitting by designation, unanimously affirmed the decision of the district court, except as to one employee whom the Court of Appeals found to have been employed pursuant to a valid wage agreement under 29 U.S.C. § 207(g)(3).

On February 18, 1988, the Court of Appeals denied rehearing.

The district court had jurisdiction of this matter under 28 U.S.C. § 1331.

The District Court's Reliance on the Compliance Officer's Report

2. With respect to all of the employees for whom the government claimed unpaid wages – excepting the individual found not to have been employed by the Normans – the district court adopted the liability findings as well as the damages computations of the Department of Labor compliance officer, Stanton Morgan ("compliance officer" or "Morgan"), purporting to rely upon this Court's decision in *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680 (1946). In each of its findings, the district court simply stated that uncompensated hours had been "proved," that the employer's records had been shown to be inaccurate, and that the compliance officer's calculations were "a just and reasonable inference" of the damages owed. App., A-9.

The evidence before the district court included the testimony of several employees and former employees, the notes, computations and testimony of the compliance officer, the testimony of

the petitioners and payroll records. (The district court declined to credit any of the testimony of the Normans or anything in the payroll records; therefore that evidence will not be further cited.) On virtually every issue the district court adopted the conclusions stated in the compliance officer's report without reference to the evidence or testimony presented at trial other than Morgan's general assertion that his report was factual. App., A-14.

Department Manager's Hours

The only testimony as to hours worked by department managers included that of *Kenneth English* who stated that he worked 40, 45, and on one occasion, 48 hours a week and *Clifton Arthur Smith* who testified that he worked 45 hours per week; Morgan's report estimated that both averaged 60 hours per week, but Morgan did not so testify. No evidence, testimonial or otherwise, was offered by Respondent with respect to hours worked by *Wayne Norman*, *Kenneth Lott*, *Steve Prescott*, *Sam Edwards*, or *Andrew Strickland*. Yet for all the managers the district court adopted the conclusion in Morgan's report that each had worked hours in excess of forty a week and indeed that each worked as many as 60 hours per week.

"Off the Clock" Work

With respect to various other employees for whom the government claimed unpaid wages, the only testimony regarding uncompensated hours came from employees in Norman's meat department.

Thomas Newman, a meat cutter, testified that six or seven times he'd punch out but then a meat truck would come along and he'd unload it. "Pretty frequently," Newman said, he would punch out for lunch and then voluntarily help out with Smith's knowledge if the Department was very busy. Altogether, Newman testified his time off the clock was 1 to 3 hours a week. There was no contradictory testimony from Morgan, but his estimates were that Newman worked an average of 5 uncompensated hours per week during the 9-week period from September 24, 1982 through November 27, 1982.

James O'Steen, a meat cutter, testified for the government that every week there were 3 or 4 hours worked unloading meat trucks after clocking out; Morgan's calculations credited O'Steen with an average of 44 hours a week.

Douglas Fazendin did not testify, and he was not mentioned in any witness' testimony. He appears only in Morgan's calculations. Fazendin was also a meat cutter, but, for unexplained reasons, Morgan estimated that he averaged 12 uncompensated hours per week from September, 1983 to May, 1984.

Other Employees

The district court adopted the conclusions in Morgan's report as to both liability and hours worked for the following employees in other departments and employees who worked outside the main store on seasonal Christmas tree lots operated by petitioners:

Debbie Taylor, a cashier, did not testify, and there was no testimony about her work hours. For unexplained reasons, Morgan's report estimated that Taylor averaged 54 hours a week.

Ben Usher did not testify that he worked at a Christmas tree lot, nor did Morgan. Morgan's report nevertheless stated that in December, 1982, Usher worked at a Christmas lot, 8 hours a day, 7 days a week, for 3 weeks in addition to his regular 40-hour week in the store; it was apparently assumed that Usher was not paid at all for these overtime hours.

Charles Hunter did not testify, but David Butts, who worked at the lot in 1982 and managed it in 1983, stated that Hunter worked full-time for 4 weeks at the lot in December, 1983. Butts testified that Hunter worked 30 or 35 hours, and sometimes 45 during the busier weeks, which he said were the 1st and 3rd, and denied that Hunter (or anyone else) would work 10 or 12 hours a day during the 4-week period. Morgan did not testify about Hunter, but his report estimates that Hunter worked 83 hours a week for 2 weeks and an additional 3 days at 7½ hours a day.

Liza (Elizabeth) Hunter, Butts testified, would cashier at the Christmas tree lot for a few hours from time to time and Butts

would pay her in cash at the rate of $3.35 an hour; she worked approximately 10 hours a week, according to Butts. There was no other testimony regarding Ms. Hunter, but Morgan's report estimates that for one week in December, 1983, she worked 77 hours.

No testimony was offered as to hours worked by *Darrell Sheppard*, *Jerome Cobb*, and *Jimmy McDaniel*, but the district court accepted Morgan's estimates in his report that each worked between 58 and 60 hours per week.

The district court did not cite to specific evidentiary facts in rendering its judgment. Rather, it cited to the compliance officer's general testimony with respect to his investigation and the results thereof. App. A-13. Morgan testified that his findings were based primarily upon interviews with present and former employees. When petitioners requested the names of these witnesses both at Morgan's deposition and during cross-examination at trial, he raised the informant's privilege and would not disclose the information. Thus, the Normans were never given the opportunity to question those witnesses whose alleged statements to Morgan provided the sole factual basis for the district court's decision on liability as well as damages.

Employees Claimed to be Exempt as Executives

The district court also rejected the employer's argument that its department managers were exempt from the FLSA as executive employees. The district court based that holding on its finding (here again, adopting the conclusion of Morgan's report) that the employees were not engaged in management duties for the majority of their working hours. App., A-8.

With one exception, each of the employees claimed to be managers testified as to his high salary and management duties.

Clifton Arthur Smith, former Meat Market Manager, testified that he regularly made decisions with respect to buying, pricing, hiring and firing employees, and supervising and scheduling their work, all without consultation with the Normans. He was paid $460 per week, considerably more than any other employee in the Meat Market.

James O'Steen succeeded Smith for several weeks, earning $390 per week. His duties were similar to Smith's, but he said he did less paperwork.

Kenneth Lott, former Manager of the Seafood Department, testified that although most of his time was spent waiting on customers, he constantly monitored the employees. Other employees testified that Lott supervised their work. Lott also had authority to price items on the open market, effectively recommended employees for hiring, and fired at least one employee on his own accord. He was responsible to see that the Department made a profit. Lott received $325 per week.

Stephen Prescott, Natural Foods Manager, hired two employees, supervised his department including ordering goods, and setting up, without supervision from Norman, and was responsible for the profit and appearance of his department. Karin Macomber, Assistant Manager of the Department, testified that Prescott trained her and regularly supervised other employees. Prescott also earned considerably more than hourly workers, $390 per week.

David Butts, Christmas Tree Lot Manager in 1983, earned $300 per week. He set tree prices, and supervised the other workers on the lot, making sure that there was sufficient help and that the workers were doing what they were supposed to do. David Norman had little or no input into running Butts' Christmas tree lot.

Kenneth English testified that he served as Produce Manager for 5 to 6 months and Seafood Manager for 3 or 4 months, performing the same duties as the regular manager. In 1983 he earned $300 per week, and in 1984 he earned $330 per week.

Andrew Strickland, head cashier, supervised the cashiers and bag boys at night, received complaints from the cashiers, and closed the store. In September of 1982, he was earning $350 per week which was raised to $385 in 1983.

J. Wayne Norman testified that, as Produce Manager, his duties included hiring, firing, figuring prices, ordering produce and telling employees in the Department what to do. Keith Henderson

testified that when he was in the position of Produce Manager, he had exercised similar duties. Wayne Norman earned $300 a week.

The district court did not discuss any of this testimony or discuss each employee's status on an individual basis. Rather, it adopted the finding of the compliance officer that *all* of these employees were merely "working foremen" because their management responsibilities did not consume the majority of their working hours. App. A-8.

3. The court of appeals unanimously affirmed the district court's holdings with respect to liability and damages as well as its holding that the department managers were not exempt from the FLSA as executive employees.

First, the court of appeals affirmed the blanket adoption by the district court of the conclusions in Morgan's report with respect to liability and damages. The court of appeals did not address petitioners' argument that no evidence or testimony was presented at trial to support Morgan's conclusions, which were adopted *in toto* by the district court. Rather, the court of appeals stated without analysis or citation to any legal authority:

> In many situations when FLSA claims are made against employers there are inaccurate or inadequate records maintained as to each employee. Under these circumstances, the district court will look to the litigants for assistance. Brock offered the testimony of the compliance officer. . . .
>
> * * *
>
> Stanton Morgan, compliance officer, provided the court with estimates as to the hours worked of each employee. The district court accepted these calculations for its own use in determining exactly which employee was owed what amount. App., A-35, 36.

Thus, the court of appeals explicitly approved the rendering by the district court of a judgment reflecting the enforcing agency's

hearsay conclusions instead of a judgment based upon sworn testimony and other evidence admitted at trial.

Although urged by petitioners, the court of appeals failed to address the due process implications of a district court's blanket adoption of the report of an agency investigator without requiring further supporting evidence in a case where the agency refused to disclose the names of witnesses upon whose testimony its findings were based.

Second, with respect to the claimed exemptions, the court of appeals recited the applicable regulations and stated that the district court's determination was not "clearly erroneous". Thus, it affirmed the district court's application of an incorrect "majority of time" legal standard for the determination of the executive exemption. App., A-31.

The court of appeals "disagreed" with petitioner's argument that the district court erred in failing to consider each employee claimed to be exempt on an individual basis. The court of appeals did not state the basis for this disagreement nor consider the evidence offered at to each employee individually. Nevertheless it affirmed the district court's decision without further analysis. App., A-28.

Reasons For Granting The Petition

This case raises two important issues, *viz.*, (1) whether a district court may adopt, *in toto* the findings and conclusions of a government compliance officer as to both liability and damages where the evidence supporting of those findings and conclusions is not disclosed or presented at trial and (2) whether the executive exemption to the FLSA only applies when an employer can show that a manager or supervisor spends the majority of his working time engaged in management duties even when the employee earns more than $250 per week. On the first issue, the court of appeals sanctioned the district court's violation of petitioners' due process rights as well as its misapplication of this Court's decision in *Anderson v. Mt. Clemens Pottery* by upholding a decision

based upon the findings of a government compliance officer, the factual basis for which was never disclosed to the petitioners and which was supported only by the general testimony of the compliance officer himself at trial. The court of appeals also upheld the district court's admission of the compliance officer's findings and conclusions as evidence of their truthfulness, despite contrary holdings by the Ninth and Tenth Circuit Courts of Appeals. On the second issue, the court of appeals, in conflict with holdings of the First, Second and Fifth Circuits, and in contravention of express language contained in the Code of Federal Regulations, approved the district court's requirement that an employee be engaged in management duties for a majority of his working hours to be considered exempt as an executive under the FLSA.

The first ruling profoundly affects not only the due process rights of petitioners herein but condones a grave departure from a trial court's responsibility to adjudicate impartially based upon evidence accessible to both parties; the ruling is a clear misapplication of this Court's decision in *Anderson v. Mt. Clemens Pottery* and directly conflicts with the recent holding of this Court in *Brock v. Roadway Express, Inc.*, 481 U.S. ____, 107 S.Ct. 1740 (1987). The second ruling establishes an erroneous and inconsistent precedent for the determination of an important exception to the FLSA which is essential to every business subject to that law. Thus, both warrant review by this Court.

I. This Petition Raises Important Issues with Respect to Due Process in Compliance Proceedings and Reveals a Conflict Between the Circuits as to the Admissibility of the Findings of a Government Compliance Officer and with a Recent Decision of this Court

The court below, misapprehending the import of the district court's unwarranted adoption of a government compliance officer's report as its own judgment, sustained the district court's action and held that the general testimony of the compliance officer bolstering several of his own findings was sufficient to support the judgment. App., A-14. Both courts justified the decision by a dangerous and unconstitutional misapplication of this Court's

decision in *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680 (1946). Although the court of appeals noted that the district court had refused to credit the testimony of the employer and that not every employee need testify as to hours worked, App., A-35, it completely disregarded, as did the district court, (1) the testimony of numerous employees that was not discredited by the district court and that constituted the only testimony at trial with respect to the hours worked by those employees, none of which was consistent with the compliance officer's report; and (2) the fact that the substance of the conclusions of the compliance officer and the evidence upon which they were based were never disclosed to the petitioners. Thus, the court of appeals did not acknowledge that petitioners were in effect precluded from challenging the hearsay conclusions offered by Morgan's report as even the testimony of employees at trial contradicting those findings, was ignored by the district court. This denial of elementary due process was affirmed by the court of appeals, opening the door for similar violations in future FLSA proceedings. Accordingly, the attention of this Court is warranted.

1. In *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680, this Court set forth a clear standard for determining damages where liability under the Act is established and the employer's failure to keep accurate records prevents the trial court from ascertaining the exact number of uncompensated hours. The employees (or the Secretary of Labor acting on their behalf) must produce "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Id.* at 687. The employer must then be given an opportunity "to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.* at 687-688. *Mt. Clemens* did not change the burden of proof for establishing *liability* under the Act and has no application until after liability has been established. *Id.* at 687-688. Moreover, the *Mt. Clemens* decision does not justify wholly unsupported estimates of damages but only those based upon a "just and reasonable inference". *Id.*

a. In its decision, the court below did not address petitioners' argument that the district court made findings of liability with

respect to certain employees for whom no evidence of uncompensated hours was produced. Petitioners acknowledge that under *Donovan v. New Floridian Hotels, Inc.*, 676 F.2d 468, 472 (11th Cir. 1982), it is not necessary for each and every employee to testify in order to make out a violation of the FLSA. It is essential, however, that there be some testimony supporting a finding that a pattern of uncompensated hours existed with respect to each category of employees for whom damages are sought. *Id.* at n. 7.

The only evidence presented to the district court herein concerned employees in *one* department (meat), having the same supervisor, and allegedly performed similar tasks "off the clock". This evidence arguably supports a pattern of uncompensated hours in *that* department under *New Floridian Hotels*, but does not support a finding of liability with respect to a cashier, and employees in several other departments. The district court relied upon the testimony of the compliance officer to establish the violations across the board, and the court of appeals affirmed that reliance. Since the compliance officer only testified as to his general conclusions, which was purportedly based upon interviews with employees whose names he would not disclose despite numerous requests, petitioners had no means to challenge his conclusory testimony. Without the production of evidence at trial petitioners had no viable means of defending against the government's claim.

The district court invoked *Mt. Clemens Pottery* to justify its application of the evidence offered with respect to employees in the meat department to all other employees, stating that the violation had been established as a matter of "just and reasonable inference". In *Mt. Clemens Pottery*, however, this Court did not address the issue of liability. The decision involved the determination of damages where an employer's records are inaccurate *and* liability under the FLSA has been established. 328 U.S. at 688. Thus, before the "just and reasonable inference" standard is applied, it is "assum[ed] that the employee has proved that he has performed work for which he was not compensated." *Id.* The plaintiff's burden of establishing liability was not affected by *Mt. Clemens Pottery*. *Id.* The district court's unprecedented extension

of the "just and reasonable inference" standard to impose liability, an extension now upheld by a court of appeals, will unquestionably lead to further misapplication of *Mt. Clemens Pottery* in future compliance proceedings.

This Court's attention is necessary to insure correct and consistent application of the *Mt. Clemens Pottery* decision.

b. In addressing petitioner's argument that the district court's estimates of back wages were not justified by *Mt. Clemens Pottery*, the court below held that it is not necessary for all of the employees to testify to estimate damages owed, and that the district court could properly discredit the testimony and payroll records of the Normans and rely completely upon the estimates and testimony of Morgan as evidence of their accuracy.

Petitioners did not argue that every employee need testify in order to establish a "just and reasonable inference" of damages but that the acceptance of the compliance officer's calculations without any supporting testimony from any employee was improper under *Mt. Clemens Pottery*. See *New Floridian Hotels*, 676 F.2d at 472-473. Petitioners argued that the district court improperly adopted the estimates without requiring any supporting evidence other than the estimates themselves.

As held by the courts of appeals for the Ninth and Tenth Circuits, the computations of a compliance officer in determining damages under the FLSA are not admissible as evidence of their truth but only to describe the methodology used to compute the damages. *Brock v. Seto*, 790 F.2d 1446 (9th Cir. 1986); *Hodgson v. Humphries*, 454 F.2d 1279 (10th Cir. 1972). Here, the district court not only allowed the computations to be used as evidence, but adopted them as the factual basis for its own judgment. App., A-14. The court below condoned the district court's action but did not cite to any legal authority or offer any legal analysis to sustain such an action. App., A-35. The conflict between the holding of the Eleventh Circuit herein and prior holdings of the Ninth and Tenth Circuits on this issue requires resolution by this Court.

The impropriety of admitting Morgan's report as evidence of its truth is clear when the findings are compared with the testimony actually presented by employees.

Two department managers testified that they averaged between 40-48 hours per week. Morgan's report estimated that each averaged 60 hours per week.

Two employees in the meat department estimated that they worked between 1 and 4 uncompensated hours per week. Morgan's report credited them with 4 and 5 uncompensated hours per week each, and estimated an average of 12 uncompensated hours per week for a third employee in the meat department for whom no testimony was offered.

There was no evidence offered with respect to cashiers, yet Morgan estimated that one cashier averaged 54 hours per week. Another employee who, although a witness, did not testify that he worked on a Christmas tree lot was credited by Morgan's report as working on one for 8 hours per day, seven days a week for 3 weeks in addition to his regular 40 hours at the store. The Christmas tree lot manager testified that another employee worked on the lot for 30 to 35 hours a week except for two busy weeks when he worked 45; that employee was credited in Morgan's report with working 83 hours per week for two weeks. His wife, who the manager testified occasionally cashiered for 10 hours per week, was credited in Morgan's report with working 77 hours for one week in 1983.

Three other employees for whom no testimony was offered were credited with 58 to 60 hours per week.

All of Morgan's estimates were accepted by the district court which supported its findings with the testimony of Morgan, purportedly in accordance with *Mt. Clemens Pottery*. App., A-9, 13. This application of *Mt. Clemens Pottery* was sustained without discussion by the court below. App., A-35, 36.

Admittedly, *Mt. Clemens Pottery* conveys broad discretion on the district court where an employer's records are held to be

inaccurate. Nonetheless, *Mt. Clemens Pottery* provides for certain limitations on that discretion – liability must first be proved; then damages must be proved as a matter of "just and reasonable inference." The district court ignored those limitations in rendering what it styled as its own judgment, but which was actually a predetermined result based on the findings of the compliance officer. The misapplication of *Mt. Clemens Pottery* by the court below to produce a result that is consistent neither with that decision, nor with the Fifth Amendment and decisions of the Ninth and Tenth Circuits, demands the attention of this Court.

2. Petitioners argued to the court below that their due process rights were trammeled by the proceedings in the district court because the government refused to disclose the substance of the evidence gathered by it; that evidence was used as the basis for bringing the contempt petition and, subsequently, the judgment. App., .

At a minimum due process requires the opportunity to be heard at a meaningful time and in a meaningful manner. *Matthews v. Eldridge*, 424 U.S. 319 (1976). To be heard in a meaningful manner, a person must have notice of the substance of the evidence against him. *Brock v. Roadway Express, Inc.*, 481 U.S. _____, 107 S. Ct. 1740 (1987).

In *Roadway Express*, a majority of this Court held that the Secretary of Labor's procedures under § 405 of the Surface Transportation Assistance Act of 1982, 49 U.S.C. Appx. § 2305, ("STAA") were unconstitutional under the due process clause of the Fifth Amendment because they did not provide for disclosure to the employer of the substance of the evidence against it, including the names of witnesses, uncovered in a government investigation under the STAA. In holding that the Secretary of Labor could not temporarily reinstate an employee who claimed to have been discharged for reporting employer safety violations in the absence of such disclosure to the employer, a plurality of the Court stated:

> We conclude that minimum due process for the employer in this context requires notice of the

> employee's allegations, notice of the substance of the relevant supporting evidence, an opportunity to submit a written response, and an opportunity to meet with the investigator and present statements from rebuttal witnesses. The presentation of the employer's witnesses need not be formal, and cross-examination of the employee's witnesses need not be afforded *at this stage of the proceedings*. *Roadway Express*, 107 S. Ct. at 1748 (emphasis added).[3]

Petitioners herein were given no information with respect to the substance of the evidence uncovered by Morgan in his investigation, and no opportunity to persuade him that the information gathered was inaccurate or incorrect. Moreover, since that information was not disclosed at trial, petitioners could not defend against the conclusions stated in the report even at that stage of the proceedings. Without knowing the names of the witnesses who had purportedly supplied Morgan with information, petitioners were not afforded the opportunity to discredit those witnesses or their testimony.[4]

Under these circumstances, petitioners could not meaningfully controvert the report or general testimony of Morgan; as they could not do so, the district court adopted Morgan's conclusions as its own and rendered judgment against the petitioners. App., A-9, 13, 14. Petitioners were unquestionably deprived of the opportunity to be heard in a meaningful manner as required by the due process clause of the Fifth Amendment and the failure of the court below to correct this unconstitutional procedure as mandated by *Brock v. Roadway Express, Inc.*, warrants consideration by this Court.

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[3] Although *Roadway Express* involved an administrative adjudicatory proceeding, it is clearly applicable where, as here, a district court adopts *in toto* the findings of an administrative agency's investigator.

[4] Although the majority opinion in *Roadway Express* does not require cross-examination in a predeprivation proceeding, 481 U.S. at ____, 107 S. Ct. at 1748, it clearly contemplates such a requirement in a final proceeding. *Id.*

II. The Petition Raises Important Issues With Respect to The Application of the Executive Exemption to the FLSA and Reveals a Conflict Among the Circuits as to the Application of that Exemption.

The decision below, in affirming the district court's application of a "majority of time" standard for determining whether an employee is exempt from the FLSA as a manager under 29 U.S.C. § 213(a), conflicts with the express language of the applicable regulations and holdings in the First, Second and Fifth Circuits, all of which provide that time shall not be the sole factor in determining whether the exemption applies. 29 C.F.R. § 541.1; 29 C.F.R. § 541.103; *Donovan v. Burger King*, 675 F.2d 516 (2d Cir. 1982)(hereinafter "Burger King II"); *Donovan v. Burger King*, 672 F.2d 221 (1st Cir. 1982)(hereinafter "Burger King I"); *Cobb v. Finest Foods, Inc.*, 582 F. Supp. 818 (E.D. La, 1984), *aff'd*, 755 F.2d 1148 (5th Cir. 1985).

Under the regulations promulgated by the Secretary of Labor, 29 C.F.R. § 541.1, a manager who is paid $250.00 per week or more is considered to be exempt from the FLSA so long as his or her primary duty is management of the enterprise or a department thereof and he or she customarily and regularly directs the work of two or more employees.[5]

Petitioners claimed that nine employees were exempt as managers. The district court did not question the evidence that each of the nine earned over $250.00 a week during the period he was functioning as a department manager or that each directed the work of at least two employees, but endorsed Morgan's conclusion that each was no more than a working foreman whose "primary duty" was not the management of his department. The basis for this determination was the conclusion that the aggregate of time spent by the department managers

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[5] This is known as the "short test" in contrast to a four-part test applicable to managers who earn between $155.00 and $250.00 a week. For unexplained reasons, the district court applied both tests to Normans' managers, all of whom earned over $250 per week, App. A-6, and the court of appeals cited that action with approval. App., A-30.

performing management duties "would not predominate even a forty-hour workweek", and did "not amount to a majority of even a forty hour week". App., A-7. The district court relied upon *Lyles v. K-Mart Corp.*, 519 F. Supp. 756 (M.D. Fla. 1981), wherein a group of employees were determined to be managers because 70 percent of their time was spent doing "managerial" work, as a minimum standard, and held that petitioners' managers did not meet this 70% criterion. App., A-8.

The applicable regulations state that: "[a] determination of whether an employee has management as a primary duty must be based on all the facts in a particular case." 29 C.F.R. § 541.103. The amount of time spent performing managerial duties is a useful guide, but the regulations and at least three Circuits have expressly rejected time as the sole test. *Id. See Burger King II*, 675 F.2d at 521, (finding as to allocation of work time is not dispositive of primary duty question); *Burger King I*, 672 F.2d at 225-226 (same); *Cobb v. Finest Foods, Inc.*, 582 F.Supp. at 822-823 (same). The relative importance of managerial and non-managerial duties, the frequency with which the employee exercises discretionary powers, the employee's relative freedom from supervision, and the relationship between the employee's salary and the wages paid to employees doing similar non-exempt work should all be considered along with the amount of time the employee is engaged in performing managerial tasks. *Id.*

In *Burger King I*, 672 F.2d at 227, the First Circuit, held that a finding that an employee is "in charge" precluded a finding that the employee does not have management as his primary duty, regardless of whether the time actually spent performing managerial duties is less than half. The district court herein, however, disregarded the testimony of the department managers that each was in charge of his department and considered only the allocation of their worktime.

The district court's use of time as the dispositive factor without considering the other factors delineated in 29 C.F.R. § 541.103 was not only improper but was also in direct conflict with the construction of the exemption by the First, Second and Fifth Circuits. The court's citation of the *Lyles* decision for disposing of

all of the claimed exemptions underscores its failure to abide by the directive that the determination "be based on the facts of a particular case," 29 C.F.R. § 541.103; the rule adopted by the district court and approved by the court below renders it virtually impossible for an employer with a small or moderately sized workforce to show that any of its managers fall within the Act's exemption.[6]

The court below did not address petitioner's argument that the district court had applied an incorrect "majority of time" standard. Rather, it affirmed, as not clearly erroneous, the district court's application of the facts herein to that standard. App., A-31. Thus, it impliedly endorsed the district court's analysis. The attention of this Court is necessary to correct what is an improper and inconsistent application of the FLSA exemption.

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[6] The district court's decision on this issue was also flawed by its failure to consider the status of each department manager individually. The court decided that none of the department managers fell within the executive exemption despite the fact that petitioners presented evidence as to each, and the government produced rebuttal with respect to only three out of the seven. Where the employees involved do not have substantially identical duties and/or salaries, the statute and the regulations require that separate determinations be made. *See Lyles v. K-Mart Corp.*, 519 F. Supp. 756; *Marshall v. Hudson Stations, Inc.*, 24 Wage & Hour Cas. (BNA) 260 (D.Kan. 1979). *Cf. Wirtz v. C&P Shoe Co.*, 336 F.2d 21 (5th Cir., 1964). The court below did not address this argument, and erroneously stated that the district court had addressed each manager individually. App., A-28.

Conclusion

For all of the foregoing reasons, the petition for a writ of certiorari to the Court of Appeals for the Eleventh Circuit should be granted.

Respectfully submitted,

VEDDER, PRICE, KAUFMAN
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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

CASE NO. GCA 81-0049-MMP

RAYMOND J. DONOVAN,
Secretary of Labor, United States Department of Labor,

Plaintiff,

vs

NORMAN'S COUNTRY MARKET, INC.,
DAVID A. NORMAN and INDIA A. NORMAN,

Defendants.

ORDER

This case is before the Court upon plaintiff's petition for adjudication in civil contempt (doc 24). Plaintiff alleges that defendants have engaged in various employment practices which violate provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §201, *et seq.*, and the September 12, 1982 consent judgment entered by this Court which permanently enjoined defendants from any such violations and ordered affirmative relief for past violations. The Court entered an order to show cause on December 18, 1985 (doc 26), and a show cause hearing was held on March 12, 1986.

The first type of violation alleged by plaintiff is that defendants coerced the return of back wage checks which were awarded pursuant to the consent judgment. Plaintiff alleges that the following five employees were coerced to return the money: Kenneth Lott, Lula Mae Clayton, Darrell Sheppard, Joseph Upshaw, and Andrew Strickland. Defendants deny that the money was sought or accepted. David Norman testified that each of those

employees offered to return the money, but he declined to accept it. Thereafter, at his suggestion, the money was donated to the Highlands Missionary Baptist Church, which he and his wife attend.

Four of the five employees allegedly coerced into returning the back wages testified at the hearing. Kenneth Lott testified that David Norman approached him and told him that the reason he had not received a recent pay raise was because he had not returned the back pay award. Lott testified that this conversation occured on Saturday, September 17, 1983. On the following Monday, September 19, Lott's wife went to the bank, withdrew cash in the amount of Lott's back pay award, and took it to Lott at work. Lott then gave the cash to Mr. Norman. Lott testified that he had no understanding that it was to go to any church. Clayton, Sheppard, and Upshaw all testified that they voluntarily returned the money to Mr. Norman so that he could give it to the church.

Thus, three of the four allegedly coerced employees who testified supported defendants' denial of this allegation. Nevertheless, several factors lead the Court to reject that testimony, and the Court finds the allegation to be true. Initially, the Court notes that while Lott is no longer employed by defendants, Clayton, Sheppard, and Upshaw were still employed at Norman's Country Market at the time of their testimony. Clayton testified that she cashed the check and gave the money to Mr. Norman to give to the church. She is not a member of that church. Further, she testified that she had no conversation with either Mr. or Mrs. Norman about the check. The Court asked Clayton how she came to walk up to Mr. Norman and hand him over one thousand dollars in cash to give to his church. She offered no real explanation; she simply did it on her own without suggestion from anyone. Clayton's version of these events strains credulity. Moreover, Lott's contradicting version of these events satisfactorily explains the troubling and illogical aspects of her testimony. Not only is the substance of Clayton's testimony unconvincing, but her demeanor on the witness stand also detracted from the credibility of her testimony; the Court observed that she seemed to be scared of something.

Sheppard and Upshaw testified that they felt that they could not keep the money and so they returned it to Mr. Norman to give to the church. Both testified that they had no discussion with Mr. Norman about the checks.

Mr. Norman's testimony was different, however. He testified that in each case, the employee approached him to return the check. He told them that he could not accept the money but suggested that they could donate it to his church. Finally, he testified that they gave the money to the church. It is clear from the evidence that Mr. Norman was in error when he testified that the employees gave the money to the church. The church treasurer testified that Mr. Norman brought in the donations. Although the Court finds it implausible that all three employees would cash the checks and give cash to Mr. Norman under the circumstances as they related them, no one could explain why this was done. It is submitted, once again, that the explanation is revealed in Lott's testimony.

Art Smith testified that he overheard Mr. Norman say that if the employees did not return the money he would fire them. The statement was made shortly after the judgment and Mr. Norman was very angry. Mr. Norman admitted making the statement but denied ever asking anyone to return the money.

Keith Henderson, an associate pastor at a baptist church at the time of the hearing, testified that he, too, offered his back wage money to Mr. Norman, but Mr. Norman would not accept it. In contrast to Clayton, Sheppard, and Upshaw, Henderson apparently was not invited to donate the money to the Normans' church. This discrepency is unexplained. In any event, Henderson was a most defensive witness and was rather thoroughly impeached.

Finally, the evidence in support of plaintiff's allegation that employees were fired for failure to return the back-wages is consistent with the Court's conclusion that these five employees were coerced into returning their awards. Having considered all of the evidence presented at the hearing and having made significant

credibility judgments, the Court concludes that defendants' version of these events is simply beyond credibility. On behalf of the aggrieved employees, plaintiff shall recover the following:

Lula Mae Clayton	$1,247.71
Kenneth Lott	1,104.00
Darrell Sheppard	979.85
Andrew Strickland	233.33
Joseph Upshaw	6,088.00
TOTAL	$9,652.89

Defendants are next alleged to have violated this Court's previous order by firing three employees who refused to return their back wages. Because the circumstances surrounding the termination of Inez Congleton and Ben Usher were similar, the Court will address those terminations together. In neither case did Mr. or Mrs. Norman tell the employee that they were fired because of their failure to return the money. Mrs. Congleton testified that she was called to the office and questioned about what she did with the check. When she told the Norman's she had deposited it into her bank account, they told her to go bring the cash drawer from her register up. She interpreted that as meaning she was fired. Usher testified that after he cashed the back-wage check he was fired and given the explanation that he could no longer be trusted and was no longer needed. Although he did not state it clearly, Usher seems to have understood that he was fired because he did not return the back wages.

Defendants offer a different version of these events. Mrs. Congleton is said to have quit her job after the conversation in the office. During that conversation, she is said to have protested the return of the money, but the Normans are said to have denied any interest in the money. Instead, they say she was called up because of her poor performance. Indeed, other witnesses testified to her performance and complaints arising therefrom. As to Usher, defendants explain that while his services were terminated, he was merely an independent contractor and not an employee. And he, too, was terminated not for failure to return the money, but for poor performance.

Once again, the Court finds that defendants' version of these events strains credulity. Usher testified that he cannot read or write, but he was sent to get a license to do janitorial work by Mr. Norman. Despite getting a license, he never worked for anyone but Mr. Norman during that period. The acquisition of a license by Usher did not make him a contractor; he remained an employee of Norman's Country Market and continued performing the same duties.

As for the reason for the termination of Mrs. Congleton and Usher, the Court can only conclude, in light of the previous finding that other employees were coerced into returning their back-wage awards, that these two employees were fired for their failure to do so. Not only is this conclusion consistent with the Court's previous finding of coercive kickbacks, but the Court's conclusions thus far are much more easily squared with logic and human nature than the explanations offered by defendants.

Mrs. Congleton testified that she has not been employed since being fired from Norman's Country Market on May 2, 1983, and plaintiff seeks to recover lost earnings from that date until February 24, 1984. On behalf of Usher, plaintiff seeks to recover lost earnings from April 1, 1983, the approximate date of his termination, until July 7, 1983, when he found other employment. Stanton Morgan, a former Compliance Officer with the Department of Labor's Wage and Hour Division, has computed the lost earnings for these two employees. The court adopts Morgan's computations. Plaintiff shall recover the following amounts on behalf of these employees:

Inez Congleton	$7,502.00
Ben Usher	1,876.00
TOTAL	$9,378.00

Plaintiff also alleges that Charles Congleton, Mrs. Congleton's son, was fired because he did not return his back-wage award. Mrs. Congleton's testimony was that when she left the store upon being fired, she took Charles with her. He was not present in the office when the conversation with the Normans took place.

Mrs. Congleton's testimony gives no indication that during that conversation the Normans were interested in recovering the money awarded to Charles. Charles simply left the store when his mother left. He was not fired, and plaintiff will not recover on his behalf.

Plaintff next alleges that defendants have violated §§206,207, and 215(a)(2) by paying employees less than the applicable minimum wage rate and by failing to pay employees for employment in excess of forty hours per workweek at rates of at least one and one-half times the regular rates at which they were employed. As to some of the employees to which this allegation applies, defendants assert that they are exempt from the provisions of §§206 and 207 by 29 U.S.C. §213(a)(1). The relevant portion of that examption is as follows:

> (a) The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to –
>
> (1) any employee employed in a bona fide executive, administrative, or professional capacity ....

29 U.S.C. §213(a)(1). The term "employee employed in a bona fide executive ... capacity" is defined in 29 C.F.R. §541.1. The regulation contains six requirements which must be established for an employee to be found exempt. Alternatively, however, it contains what is referred to as the "short test". If an employee's salary is at least $250 per week, an exemption will be established by showing only the first two requirements under §541.1. *See* 29 C.F.R. §541.1(f). Consequently, under either test, the following two factors must be established: (1) the employee's primary duty must consist of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof, and (2) the employee must customarily and regularly direct the work of two or more other employees therein. Defendants contend that this exemption applies to at least part of the following persons' employment: David Butts, Kenneth English, Kenneth Lott, Wayne Norman, Steve Prescott, Clifton Art Smith, Andrew Strickland, and William Edwards.

The burden of proving the applicability of the executive exemption is upon the defendants, and the exemption is to be applied only to those clearly and unmistakably within the terms and spirit of the exemption. *Lyles v. K-Mart Corporation*, 519 F. Supp. 756, 760 (M.D. Fla. 1981). The regulations outline the considerations which may be relevant to the determination of whether an employee's primary duty is management. *See* 29 C.F.R. §541.103. Because defendants have failed to sustain their burden of proving that the primary duty of these employees was the managment of their departments, the Court must conclude that they are not exempt as executives under either of the regulations' tests.

Mr. and Mrs. Norman testified in rather conclusory terms that their managers' primary duty was the management of their departments. Kenneth Lott testified that he had few management duties as seafood manager. On cross-examination, he was questioned about various duties which might qualify as management duties. The aggregate of those duties would not predominate even a forty-hour workweek, much less the actual hours worked by Lott. Wayne Norman offered similar testimony. In addition, however, he testified any such management duties were performed only after consultation with David Norman. He testified that David Norman spent a couple of hours a day in his department.

Art Smith's testimony outlined the management duties he performed as manager of the meat market. Also in evidence is a report prepared by Morgan of a personal interview with Smith. In that report, Smith describes his management duties in even greater detail and estimates the time spent doing each. Once again, the aggregate of time spent in a management capacity does not amount to a majority of even a forty hour week. Furthermore, the report contains the statement that Smith considered his primary duty to be that of production, or meat cutter.

Although no claim has been asserted on his behalf, Keith Henderson also testified about the nature of his duties as manager of the produce department. In response to this testimony, the government introduced another report prepared by Morgan of a personal interview with Henderson. In this report, Henderson complained specifically that although he was hired to be a

manager, he was simply another working employee. Henderson's description of his duties in Morgan's report contains only negligible management duties.

On the basis of his investigation, Morgan concluded that those employees who defendants labeled as department managers simply did not have their primary duty the management of their departments. As an example, Morgan testified that during the course of his investigation, he had the opportunity to observe the operation of the natural foods department. During that time, the manager was the only employee in the department and he was engaged in stock work.

Morgan's observation that defendants' managers are simply working foremen is accurate. They are not even remotely comparable to the plaintiffs in *Lyles v K-Mart Corporation, supra.* Accordingly, they are not exempt from §§206 and 207.[1]

Morgan has computed the back wages which are owed to the employees now under consideration. This was necessary for two reasons. The first is defendants' misclassification of these employees as managers, resulting in improperly calculated compensation. The second is defendants' failure to keep appropriate and accurate records of the hours worked. Defendants concede that no records were kept of the hours worked by employees on the Christmas tree lots. Such failure necessitates a calculation of approximate hours worked by employees such as David Butts. The evidence also indicates, however, that those records which were kept cannot be relied upon as accurate. There was ample evidence that time cards simply reflected either the Normans' overtime policy or whatever understanding on overtime that they

[1] The Court's conclusion that defendants did not pay their "managers" in compliance with the exemption and the regulations interpreting it forecloses any reliance on 29 U.S.C. §259. To be entitled to that provision's good faith defense, the act or ommission complained of must be not only in reliance on the regulation, but also in comformity with the regulation. *See* 29 U.S.C. §259; 29 C.F.R. §790.14; *Olson v Superior Pontiac -GMC, Inc.*, 765 F.2d 1570, 1579-80 (11th Cir), *modified*, 776 F.2d 265 (11th Cir. 1985).

had with the particular employee. Consequently, plaintiff has had to reconstruct the hours of these employees.

The Court finds that each of the employees now under consideration have been shown to have performed work for which they were not properly compensated. Further, the Court finds that plaintiff has produced "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Anderson v Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). Upon such a showing, *Mt. Clemens Pottery* places upon the defendants the burden of coming forward with evidence of the exact number of hours worked or with evidence to negate the reasonableness of the inference to be drawn from plaintff's evidence. *Id. See also Leonard v Carmichael Properties & Management Co., Inc.*, 614 F. Supp. 1182, 1186 (S.D. Fla. 1985). Defendants' evidence is insufficient in both quantity and credibility to establish either.

As to these employees, the Court has found a single error in Morgan's calculations of back wages. It appears in the wage transcription and computation sheet prepared for Steve Prescott (government exhibit 2, p. 20). The last figure before the total is simply the result of a multiplication error. Thirteen weeks at $65.21 per week amounts to $847.73 instead of $808.73. Aside from that mathematical error, the Court finds Morgan's calculations to be accurate to the degree required by *Mt. Clemens Pottery*, and adopts them as its own. It should be noted that Morgan's calculations include, and the Court's findings under the *Mt. Clemens Pottery* standards apply to all of the hours worked by these employees, regardless of whether defendants contend they were managers during the entire period. Plaintiff shall recover back wages in the following amounts on behalf of these employees:[2]

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[2] In addition to these employees who are alleged to have been managers, the Court's conclusions on this issue also apply to the four weeks during which James O'Steen served as manager of the meat department. Because most of O'Steen's employment was not as a manager, his back wages will not be computed until the Court reaches its analysis of the remainder of his employment.

David Butts	$ 443.85
Kenneth English	3,747.48
Kenneth Lott	1,950.00
Wayne Norman	2,805.60
Steve Prescott	3,779.15
Clifton Art Smith	2,969.26
Andrew Strickland	1,030.96
William Edwards	1,139.70
TOTAL	$17,866.00

Finally, there are fifteen other employees that plaintiff alleges were not compensated in compliance with §§206 and 207. Defendants' response to these allegations are several. First, they contend that some of these employees had agreements whereby defendants would guarantee them a certain number of overtime hours per week and those hours were taken into account, at one and one-half times their regular rate, in their weekly salary. Second, defendants deny that those employees not covered by such an agreement worked hours for which they were not paid. Third, defendants simply deny that some of these persons were their employees.

Addressing defendants' last contention first, the evidence establishes that Joey Johnson was not an employee of Norman's Country Market. His mother testified that he went to the store when he wanted and left when he wanted. She never considered him an employee or even employable. The Normans also did not consider him an employee; any money he was given was gratuitous. The Court finds that Joey Johnson was not an employee of Norman's Country Market, and plaintiff will not prevail on his behalf. All of the other persons alleged to have been defendants' employees have been shown to have worked for defendants, including Lisa Hunter.

The Court will next address defendants' contention that several of these employees were employed pursuant to an agreement as provided for in 29 U.S.C. §207(g)(3). These agreements allegedly set the rate for the first forty hours and the employee was paid

one and one-half times that rate for an agreed number of overtime hours. Defendants offer these agreements to explain the payment of flat weekly salaries to some employees.

The Fifth Circuit Court of Appeals addressed this type of contention in *Wirtz v Leon's Auto Parts Co., Inc.*, 406 F.2d 1250 (5th Cir. 1969). The Court included in its opinion the following passage from *Nunn's Battery & Electric Co., Inc., v Goldberg*, 298 F.2d 516 (5th Cir. 1962):

> When employees regularly work more than forty hours a week and receive a standard wage each week the question arises whether the weekly payment genuinely represents payment at a regular rate for the first forty hours plus time and a half for the excess hours or, instead, represents a single wage rate applied to the first forty hours and the excess hours uniformly. Courts have often disregarded an employer's assertions of an overtime payment system and have found that a fixed weekly wage covered all working hours indiscriminately.

Id. at 519, *quoted in Leon's Auto Parts*, 406 F.2d at 1251-52. Again *quoting Nunn's Battery*, the court in *Leon's Auto Parts* held that there are two indespensable factors for compliance with the overtime statute under these circumstances: "(1) an explicit understanding between the parties as to the existence of a regular wage rate that is stepped up for overtime hours and (2) a careful practice of recording the hours worked overtime by each employee and paying him for them at the increased rate." *Leons Auto Parts*, 406 F.2d at 1252 (quoting *Nunn's Battery*, 298 F.2d at 520). Although neither *Leon's Auto Parts* nor *Nunn's Battery* refer to the particular provision referred to by defendants, the issues presented in those cases are identical to the issue herein. Moreover, the Fifth Circuit's holdings delineate the relevant considerations under §207(g)(3), while not encroaching on the policies underlying §207 generally.

Mrs. Norman indicated that Jerome Cobb, Jimmy McDaniel, Mark Feather, Paul Lott, Edgar Morales, and Darryl Sheppard were employed under such agreements. Mr. Norman testified

similarly as to some of those employees. Defendants' state that the agreement in each case provided for forty hours per week at an agreed rate and one and one-half times that rate for a guaranteed number of overtime hours, usually ten or fifteen. The Court is not convinced that any of defendants' employees were covered by agreements as alleged.

Paul Lott testified that he did have an agreement, but it was simply that he would work fifty-five hours per week and be paid $325 per week. He also testified that if he worked over or under fifty-five hours per week, he was still paid the same salary. He testified specifically that he was not told that his salary represented forty hours at a regular rate and fifteen hours at one and one-half times that rate. Furthermore, the records maintained by defendants and placed in evidence at the hearing were insufficient to sustain defendants' contention. Paul Lott's compensation record (government exhibit 1) only has entries for time worked for the first nine weeks recorded. Thereafter, no time record is reflected.

Similarly, Edgar Morales testified that he was an hourly employee and was paid for fifty hours per week. He did not testify that a regular rate for forty hours was specified. His compensation record (government exhibit 1) indicates that until the September 2, 1983 pay period he was paid $160 for the first forty hours and $60 for ten hours overtime. Conveniently, this can be calculated to represent a regular rate of four dollars per hour and an overtime rate of six dollars per hour. Plaintiff is only attempting to recover back wages on behalf of Morales from the September 2, 1983 pay period. As of that date, his record indicates a flat rate of $247 per week. When his hours are recorded after that date, the figure is not always fifty hours. Yet the pay is always $247. The Court finds that any agreement between defendants and Morales did not rise to the standards required for compliance with §207.

As to Jerome Cobb, Jimmy McDaniel, Mark Feather, and Darrell Sheppard, there is no evidence to support defendants' assertion that they were employed under the type of contract allowed by §207(g)(3), except the testimony of defendants. The

court notes that the only indication of the hours worked by these persons is the computations prepared by Morgan. There are no actual records of these particular employees' hours in evidence. Moreover, it is apparent from all the evidence that defendants did not have "a careful practice of recording the hours worked overtime by each employee. . ." *Nunn's Battery*, 298 F.2d at 520. Additionally, the evidence simply will not support a finding that defendants and these employees had "an explicit understanding . . . as to the existence of a regular wage rate that is stepped up for overtime hours." *Id.* Not only the cited cases, but the statute itself requires that the agreement establish a basic rate. These employees were simply hired to work at a flat weekly rate. There was no specified regular rate, no stepped-up pay for overtime hours, and the weekly rate did not vary according to the actual hours worked. Because the Court concludes that none of these employees were employed pursuant to an agreement of the type described in §207(g)(3), their wages will have to be recomputed in full compliance with §207(a)(1).

Applying *Mt. Clemens Pottery*, the Court finds that each of the employees now under consideration has been shown to have performed work for which they were not properly compensated, and further finds that plaintiff has produced "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." 328 U.S. at 687. Morgan has recomputed the hours and wages of these employees in accordance with the overtime provisions of the Act. Defendants have not offered credible evidence of the actual hours worked by these employees, and their evidence is insufficient to negate the reasonableness of the inferences to be drawn from plaintiff's evidence. Therefore, the Court adopts Morgan's calculations as its own. Plaintiff will recover on behalf of these employees in the following amounts:

Jerome Cobb	$1,950.00
Jimmy McDaniel	960.25
Mark Feather	641.60
Edgar Morales	815.10
Paul Lott	1,673.28
Darrell Sheppard	3,803.92
TOTAL	$9,844.15

Remaining are plaintiff's claims that several other employees worked hours for which they were not properly compensated. The employees to which this allegation applies are Douglas Fazendin, Charles Hunter, Lisa Hunter, Thomas Newman, James O'Steen, Della Price, Debbie Taylor, Henry Urquhart, and Ben Usher. Once again, the Court finds that in each case plaintiff has demonstrated that these employees worked hours for which they were not properly compensated. Charles Hunter, Lisa Hunter, and Ben Usher all worked on defendants' Christmas tree lots, and defendants have conceded that no records were kept of hours worked on those lots. The entire record in this case discredits the records which were kept as to the other employees. On the basis of his investigation, Morgan has estimated the hours worked by these employees and recomputed their wages. The Court has found another mathematical error in Morgan's calculations. In the wage transcription and computation sheet for Fazendin (government exhibit 2, p. 29), the second of the three figures before the total is incorrect. Fifteen weeks at $58.45 amounts to $876.75 instead of $878.75. Having corrected that mathematical error, the Court finds that plaintiff has produced "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." 328 U.S. at 687. The evidence brought forward by defendants pursuant to their burden under *Mt. Clemens Pottery* is insufficient to persuade the Court that Morgan's calculations do not approximate the amount and extent of improperly compensated work performed by these employees.

The Court notes in passing that defendants' protestations that they did not know any of their employees were required to work off the clock are to no avail. Aside from the fact that the Court does not find this factually credible, at the time of these violations, defendants were subject to a permanent injunction against any further violations of the Fair Labor Standards Act. Under such circumstances, due diligence would have uncovered any of the practices complained of herein. In any event, it is much easier to interpret the record in this case as evidencing a design on the part of the defendants to evade the Act and the Court's order, than to interpret it as evidencing their ignorance.

Once again, the Court adopts Morgan's calculations as its own. Plaintiff shall recover on behalf of these employees in the following amounts:

Douglas Fazendin	$ 2,599.85
Charles Hunter	450.76
Lisa Hunter	169.92
Thomas Newman	445.50
James O'Steen	2,395.00
Della Price	59.40
Debbie Taylor	797.16
Henry Urquhart	498.88
Ben Usher	845.04
TOTAL	$ 8,261.51

The Court has made the following observation about the pleadings in this case. The petition (doc 24) does not list the employees on whose behalf plaintiff seeks relief. It does, however, refer to a sworn affidavit by Morgan (doc 25). Attached to Morgan's affidavit is an exhibit listing the employees he investigated and found to have been improperly compensated. Fazendin's name is not on that list. The total amount in the exhibit, however, apparently does include the amount Morgan calculated as owing to Fazendin. Nevertheless, the exhibits presented by plaintiff at the hearing, such as the summary of unpaid wages (government exhibit 3) and the wage transcription and computation sheets (government exhibit 2), do include Fazendin. Because Fazendin's name does not appear in the sworn affidavit submitted in support of the petition, the Court's findings as to him are provisional. Defendants will be allowed fifteen (15) days from the date of this order to object to the award on this ground. Any objection shall be in writing and accompanied by a legal memorandum. If defendants file no objection, the Court's findings and conclusions as to Fazendin will become final after fifteen (15) days. If an objection is filed, plaintiff will be allowed fifteen (15) days to respond.

Plaintiff also seeks to recover liquidated damages in an amount equal to the back wages which have been awarded for violations

of the minimum wage and overtime provisions since the Court's September 14, 1982 judgment. Such recovery is provided for by 29 U.S.C. §216(c). In order to avoid such an award, defendants have the burden under 29 U.S.C. §260 of convincing the Court "that the act or omission giving rise to such action was in good faith and that [they] had reasonable grounds for believing that [the] act or omission was not a violation of the Fair Labor Standards Act . . . " On this record, defendants cannot possibly make the showing required by §260. At the time of these violations, defendants were subject to a permanent injunction against the exact same violations. They had already been subjected to judgment in the amount of $31,458.86 for the exact same violations. They cannot claim to have been unaware of the Act and its application to their business. Morgan testified that he attempted to explain some of the Act's provisions to defendants. Both Mr. and Mrs. Norman confirm that they had such discussions with Morgan. Moreover, the Court finds that neither the exemptions which defendants seek to have applied, nor the minimum wage and overtime provisions are difficult to understand and apply. Under these circumstances, defendants have not demonstrated good faith. Accordingly, for those violations of the Act's minimum wage and overtime provisions which occurred subsequent to the Court's September 14, 1982 order, plaintiff, on the employees' behalf, shall recover liquidated damages in an amount equal to the back wages awarded.

On the other two items of recovery, the coerced return of the original back wage awards and the lost earnings of the discharged employees, plaintiff seeks interest. Because of the nature of this proceeding and the nature of the violation, the Court finds it appropriate that plaintiff also recover liquidated damages in an amount equal to the back wages which defendants were able to recover through coercion. Technically, those funds do not constitute recovered back wages so as to fall within the terms of §216. Instead, they constitute a court ordered award from the 1982 judgment which have been unlawfully recovered. For several reasons, however, the Court finds that an award of liquidated damage for these violations is appropriate. Initially, the Court notes that this is a contempt proceeding, and the Court has already found

substantial liability for numerous violations of both the Act and the Court's previous order. This particular violation most clearly demonstrates defendants' blatant disregard for the Court's authority. Additionally, cases construing the liquidated damage provision recognize that the provision is compensatory in nature, and not penal. In *Brooklyn Savings Bank v O'neil*, 324 U.S. 697 (1945), the Supreme Court stated: "We have previously held that the liquidated damage provision is not penal in nature but constitutes compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages." *Id.* at 707. The theory underlying the liquidated damage provision, therefore, is directly applicable to these recovered back wage awards. Not only were these employees deprived of their money at the time of its earning, but even after this Court ordered repayment they were coerced into returning the money. Thus, these employees have lost the use of their wages for almost four years since the litigation on their behalf was resolved. The 1982 judgment was a consent judgment, and did not impose liability for liquidated damages. Defendants will not now escape such liability simply because the back wages in issue have been reduced to a judgment which they have violated flagrantly. Accordingly, on behalf of the aggrieved employees, plaintiff shall also recover liquidated damages in an amount equal to the back wage awards which defendants recovered through coercion.

As noted above, plaintiff also seeks interest on the award of lost earnings to Congleton and Usher from the date of their discharge. The Court finds that the employees are entitled to interest on this award and plaintiff will recover on their behalf. The Court finds that the appropriate interest rate for the period since the discharges in 1983 is 12.5 percent. Interest will be awarded at that rate and will be compounded annually.

Applying the above rate to the lost earnings award, plaintiff is entitled to an award of pre-judgment interest on behalf of Congleton and Usher in the amounts of $3,641.19 and $937.28, respectively. These amounts consist of interest for eight months and nine months in 1983, respectively, eight months in 1986, and the

full years in between. The total amounts due to Congleton and Usher for their unlawful discharges, therefore, is $11,143.19 and $2,813.28, respectively. Plaintiff will also recover post-judgment interest on behalf of Congleton and Usher, only on the above totals, from the date of this order at the rate of 5.63%.

The following schedule contains the amounts which plaintiff has been awarded on behalf of defendants' employees:

EMPLOYEE	ACTUAL DAMAGES	LIQ. DAMAGES (INTEREST)	AMOUNT DUE
David Butts	$ 443.85	$ 443.85	$ 887.70
Lula Mae Clayton	1,247.71	1,247.71	2,495.42
Jerome Cobb	1,950.00	1,950.00	3,900.00
Inez Congleton	7,502.00	(3,641.19)	11,143.19
William Edwards	1,139.70	1,139.70	2,279.40
Kenneth English	3,747.48	3,747.48	7,494.96
Douglas Fazendin	2,599.85	2,599.85	5,199.70
Mark Feather	641.60	641.60	1,283.20
Charles Hunter	450.76	450.76	901.52
Lisa Hunter	169.92	169.92	339.84
Kenneth Lott	3,054.00	3,054.00	6,108.00
Paul Lott	1,673.28	1,673.28	3,346.56
Jimmy McDaniel	960.25	960.25	1,920.50
Edgar Morales	815.10	815.10	1,630.20
Thomas Newman	445.50	445.50	891.00
Wayne Norman	2,805.60	2,805.60	5,611.20
James O'Steen	2,395.00	2,305.00	4,790.00
Steve Prescott	3,779.15	3,779.15	7,558.30
Della Price	59.40	59.40	118.80
Darrell Sheppard	4,783.77	4,783.77	9,567.54
Clifton Smith	2,969.26	2,969.26	5,938.52
Andrew Strickland	1,264.29	1,264.29	2,528.58
Debbie Taylor	797.16	797.16	1,594.32
Joseph Upshaw	6,088.00	6,088.00	12,176.00
Henry Urquhart	498.88	498.88	997.76
Ben Usher	2,721.04	845.04	
		(937.28)	4,503.36

TOTALS	$55,002.55	$45,624.55 ($4,578.47)	$105,205.57

The parties are reminded that the award on behalf of Fazendin is provisional and subject to reconsideration upon objection by defendants within fifteen (15) days.

The consent judgment entered on September 14, 1982 contained a provision to schedule defendants' compliance with the back pay awards. The terms of that provision will also govern defendants' compliance with the awards made herein; the Court adopts and incorporates those terms, specifically, the last three paragraphs on the second page of the order.

Plaintiff raised the issue of reinstatement as to those employees who were fired for their failure to return the back wage awards. Should either of those two employees desire the remedy of reinstatement, plaintiff should file separate pleadings informing the Court and setting forth the factual and legal basis for such claims. Plaintiff will be allowed fifteen (15) days from the date of this Order to submit such pleadings. Thereafter, defendants will be allowed fifteen (15) days to respond. If a hearing is necessary, it will be scheduled at that time.

Plaintiff also seeks through its petition an award of attorneys' fees and costs. The Court will allow plaintiff fifteen (15) days from the date of this Order to file a motion and legal memorandum. Thereafter, defendants will be allowed fifteen (15) days to respond. After these filings, a hearing on this matter will also be scheduled, if necessary.

DONE AND ORDERED this 8th day of September, 1986.

/s/Maurice M. Paul

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

FILE No. GCA 81-0049

RAYMOND J. DONOVAN,
Secretary of Labor, United States Department of Labor,

Plaintiff,

v.

NORMAN'S COUNTRY MARKET, INC.,
DAVID A. NORMAN and INDIA A. NORMAN,

Respondents,

WILLIAM E. BROCK,
Secretary of Labor, United States Department of Labor,

Petitioner.

JUDGMENT IN CIVIL CONTEMPT

This cause came on to be heard on the 12th day of March, 1986, upon this Court's Order to Show Cause previously entered herein; and the Court having entered its Order herein containing findings of fact and conclusions of law on September 8, 1986, now therefore in accordance with said Order it is:

ORDERED, ADJUDGED and DECREED that Respondents, Norman's Country Market, Inc., David A. Norman and India A. Norman, are in civil contempt for violating the September 14, 1982 Judgment of this Court.

In order to purge themselves of such contempt, Respondents shall, by November 13, 1986, deliver to the petitioner, a cashier's or certified check or money order payable to "Wage and Hour Division – Labor" in the amounts of $55,002.55 in back wages,

plus $50,203.02 in liquidated damages (or interest) for a total of $105,205.57, found to be due employees in the amounts indicated as to each, as set forth in Schedule "A" attached hereto. Respondents also shall furnish the petitioner a schedule showing their employer I.D. number and the last-known address and social security number as to each of the employees listed on Schedule "A".

Petitioner, thereupon shall distribute the proceeds of such check, *less* deductions for federal income taxes and employee contributions to FICA, as required by law, to the named employees, or the their personal representatives, and any money not so distributed by the petitioner within the period of three (3) years after date of this Judgment, because of inability to locate the proper persons on because of such persons refusals to accept such sums, shall be deposited into the Treasury of the United States as miscellaneous receipts.

IT IS FURTHER ORDERED that respondents shall reimburse the Secretary of Labor by cashier's or certified check or money order payable to "Office of the Solicitor-Labor" in an amount sufficient to compensate him for his expenses in investigating and prosecuting this litigation, such amount to be determined upon submission of appropriate documentation by the Secretary within 10 days hereof.

IT IS FURTHER ORDERED and DECREED that in the event said Respondents shall fail to deliver to either the Clerk of this Court or to petitioner's attorneys the checks and the schedule of employee information, as aforesaid, by 4:30 p.m. on November 13, 1986, Respondents, David A. Norman and India A. Norman shall appear at this Court at 11:30 a.m., on November 14, 1986, and shall stand committed to the custody of the United States Marshal for this District, or for such other custody as may be directed by the Attorney General of the United States, until the aforesaid provisions are complied with in full or until said Respondents are otherwise discharged by law.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that respondents their officers, agents, servants, employees and

all persons in active concert or participation with them further are permanently enjoined from violating the provisions of §15(a)(3) of the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 215(a)(3)], by intimidating, coercing, threatening, discharging, or otherwise discriminating against any of their employees (including requiring or causing to be returned to respondents back wages owed or paid to such employees) for exercising any of their rights under said Fair Labor Standards Act.

This Court shall retain jurisdiction of this matter for such other and further action as may be necessary to enforce the terms of this Judgment. All provisions of this Court's original Judgment of September 14, 1982, unless covered herein, shall remain in full force and effect.

This 28th day of October, 1986.

/s/Maurice M. Paul

MAURICE M. PAUL
UNITED STATES DISTRICT JUDGE

SCHEDULE "A"
Page 1 of 2

Donovan v. Norman's Country Market, Inc. et al.

EMPLOYEE	BACK WAGES	LIQUIDATED DAMAGES (INTEREST)	AMOUNT DUE
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Lula Mae Clayton	1,247.71	1,247.71	2,495.42
Jerome Cobb	1,950.00	1,950.00	3,900.00
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Clifton Smith	2,969.26	2,969.26	5,938.52
Andrew Strickland	1,264.29	1,264.29	2,528.58

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

CASE No. GCA 81-00049-MMP

RAYMOND J. DONOVAN,
Secretary of Labor, United States Department of Labor,

Plaintiff,

vs

NORMAN'S COUNTRY MARKET, INC.,
DAVID A. NORMAN and INDIA A. NORMAN,

Defendants.

ORDER

The only matter pending in this cause is plaintiff's motion for costs, fees, and expenses (doc 45). On January 8, 1987, the Court granted plaintiff's motion for leave to file its motion for costs, fees, and expenses late. (doc 58) That Order also granted defendants fifteen (15) days to file a substantive response to plaintiff's motion. On January 27, 1987, defendants' attorney notified the Court by telephone that he did not intend to file a response because it seemed that plaintiff was entitled to the relief sought. The Court notes that plaintiff's motion is supported by detailed affidavits and exhibits, and the amounts sought are limited, even in the case of attorneys' fees, to the actual cost to the plaintiff of its legal services.

The Court agrees with plaintiff that defendants should be charged with costs, fees, and expenses in order to purge themselves of contempt. Further, because plaintiff's claim is detailed and limited, as noted above, the Court finds the amounts requested to be appropriate. Again, the Court notes

that defendants have no objection to this claim under the circumstances herein.

Accordingly, plaintiff's motion for costs, fees, and expenses is GRANTED. Defendants, Norman's Country Market, Inc., David A. Norman, and India A. Norman, shall pay to plaintiff, Secretary of Labor, costs, fees, and expenses in the amount of $4,295.38 incurred in the investigation and $3,732.93 incurred in the prosecution of this civil contempt action, for a total of $8,028.31. The Clerk is directed to enter a judgment in that amount against defendants, Norman's Country Market, Inc., David A. Norman, and India A. Norman, and in favor of plaintiff, Secretary of Labor.

DONE AND ORDERED this 20th day of February, 1987.

/s/Maurice M. Paul

United States District Judge

WILLIAM E. BROCK, Secretary of Labor, United States Department of Labor,

Plaintiff-Appellee,

v.

NORMAN'S COUNTRY MARKET, INC., David A. Norman and India A. Norman,

Defendants-Appellants.

No. 86-3780.

United States Court of Appeals, Eleventh Circuit

Jan. 15, 1988.

Employers appealed from judgment of the United States District Court for the Northern District of Florida, No. GCA 81-0049, Maurice Mitchell Paul, J., finding that employers were in violation of consent judgment and had additional violations of Fair Labor Standards Act. The Court of Appeals, Garza, Senior Circuit Judge, sitting by designation, held that: (1) although each employee for whom employers claimed executive exemption may have had duty which is normally recognized as that of manager's responsibility, in light of actual work performed by each, employees were nothing more than "working foremen," and therefore, executive exemption for overtime wages was inapplicable; (2) except as to one employee, employer failed to establish wage plan exception to Fair Labor Standards Act's overtime provisions; and (3) evidence supported trial court's finding of retaliatory discharges of employees who failed to return their overtime checks.

Affirmed in part, reversed in part.

Appeal from the United States District Court for the Northern District of Florida.

Before VANCE and CLARK, Circuit Judges, and GARZA*, Senior Circuit Judge.

GARZA, Senior Circuit Judge:

This appeal is brought by Norman's Country Market, Inc., David A. Norman and India A. Norman (Norman) following a determination by the district court that they were in violation of a consent judgment entered on September 14, 1982 and had additional violations of the Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. § 201 *et seq.* The Normans had agreed to pay a total of $31,458.86 in back wages to a group of 41 employees for overtime wages allegedly not paid. William E. Brock, Secretary of Labor, United States Department of Labor (Brock) alleged in the civil contempt proceedings that Norman improperly classified eight employees as department managers and thereby failed to pay them required overtime wages at time and one-half, failed to keep adequate or accurate records of the hours worked by employees subject to the overtime wage provisions of the FLSA, failed to pay overtime wages to a group of employees with whom they claimed to have made agreements on a weekly wage that included a guaranteed number of overtime hours at one and one-half times their hourly rates, failed to pay overtime wages to several employees who they knew to be working "off the clock" and that two persons claimed by Norman not to be employees were in fact employees, and not properly paid. Additional allegations that Norman coerced five employees to return the back wage checks awarded to them and that they terminated three other employees for refusing to return their back wage checks were also included.

To begin an analysis of this case, we will review the district court determination of whether Norman properly classified several of its employees as "executive employees" exempt from minimum wage and overtime requirements of the FLSA.

Norman asserts that the district court erroneously applied a "majority of time" standard for determining exempt managerial

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* Honorable Reynaldo G. Garza, U.S. Senior Circuit Judge for the Fifth Circuit, sitting by designation.

status and that the district court failed to consider each manager individually. We disagree.

The pertinent portions of 29 U.S.C. § 213(a)(1) which exempts an employer from §§ 206 and 207 is as follows:

> (a) the provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to—
>
> (1) any employee employed in a bona fide executive . . . capacity . . .

The regulation contains two tests, one is a multi-part test and the other is known as the "short test". The short test can be used to determine executive exemption when an employee is paid $250.00 per week or more, so long as his primary duty is management of an enterprise or a department thereof, and he or she customarily and regularly directs the work of two or more employees.[1]

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[1] The full text of 29 C.F.R. § 541.1 entitled "Executive", states as follows:

> The term "employee employed in a bona fide executive * * * capacity" in section 13(a)(1) of the Act shall mean any employee:
>
> (a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department *of* subdivision thereof; and
>
> (b) Who customarily and regularly directs the work of two or more other employees therein; and
>
> (c) Who has the authority to hire or fire other employees on whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion of any other change of status of other employees will be given particular weight; and
>
> (d) Who customarily and regularly exercises discretionary powers; and
>
> (e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment, who does not devote as much as 40 percent, of his hours of work in the workweek

(Footnote continued)

"Primary duty," is defined at 29 C.F.R. 541.103 and states in part as follows:

> A determination of whether an employee has management as his primary duty must be based on all the facts in a particular case. The amount of time spent in the performance of the managerial duties is a useful guide in determining whether management is the primary duty of an employee. In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the employee's time. Thus, an employee who spends over 50 percent of his time in management would have management as his primary duty. Time alone, however, is not the sole test, and in situations where the employee does not spend over 50 percent of his time in managerial duties, he might nevertheless have management as his primary duty if the other pertinent factors support such a conclusion. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, his relative relationship

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to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: *Provided*, that this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, who owns at least a 20-percent interest in the enterprise in which he is employed; and

(f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week (or $130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: *Provided*, that an employee who is compensated in a salary basis at a rate of not less than $250 per week (or $200 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed on or customarily recognized department or subdivision thereof, and includes the customary and regular discretion of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

> between his salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor, for example, in some departments, or subdivisions of an establishment, an employee has broad responsibilities similar to those of the owner or manager of the establishment, but generally spends more than 50 percent of his time in production or sales work. While engaged in such work he supervises other employees, directs the work of warehouse and delivery men, approves advertising, orders merchandise, handles customer complaints, authorizes payment of bills, or performs other management duties as the day-to-day operations require. He will be considered to have management as his primary duty.
>
> * * *

"The burden of proving the applicability of the executive exemption is upon the defendant. The exemption is to be applied only to those clearly and unmistakeably within the terms and spirit of the exemption." *Lyles v. K-Mart Corporation*, 519 F.Supp. 756, 760 (M.D.Fla.1981).

The trial court held Norman did not discharge his burden of proof, and in doing so made many credibility determinations.

The district court stated: "Because defendants have failed to sustain their burden of proving that the primary duty of these employees was the management of their departments, the court must conclude that they are not exempt as executives under either of the regulations tests." Although it was not necessary for the district court to examine Norman's claims under both tests, it nevertheless did.[2] It has been well settled that the district court has the opportunity to observe the witnesses and their demeanor, and is, therefore, in the best position to make credibility determinations, subject only to the clearly erroneous rule of Fed.R.Civ.P. 52(a). *Rodriguez v. Jones*, 473 F.2d 599, 604 (5th Cir.) *Cert. denied*, 412 U.S. 953, 93 S.Ct. 3023, 37 L.Ed.2d 1007 (1973).

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[2] It was not disputed that the employees in question each earned over $250 per week, making the "short test" applicable. For those employees who earn less that $250 but more than $155 per week, then the multi-part test of § 541.1 would be applicable.

[1] After carefully reviewing the record, we agree with the district court's determination. The employees in question were nothing more than "working foremen." Although each of them may have had a duty which is normally recognized as that of a manager's responsibility, looking at each one individually and at the actual work performed we can not say they qualified as a "bona fide executive."

Therefore, the district court's determination that all eight employees[3] did not qualify under the executive exemption was not clearly erroneous.

Norman's second point of error is that the district court erred as a matter of law in ignoring the agreed wage plans for guaranteed weekly overtime. We disagree, except as to Edgar Morales.

The guaranteed weekly plan is governed by 29 U.S.C. § 207(g)(3), which states in part:

> "No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum work week applicable to such employee under such subsection.
>
> * * * * *
>
> (3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided*,

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[3] The eight employees are David Butts, Kenneth English, Kenneth Lott, Wayne Norman, Steve Prescott, Clifton Art Smith, Andrew Strickland and William Edwards.

> that the rate so established shall be authorized by regulation by the administration as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time; and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (c) of this section are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid or other forms of additional pay required to be included in computing the regular rate.

Norman argues the payment of flat weekly salaries to some of their employees was valid.[4] Under this plan, overtime pay is computed at one and one-half times the basic rate agreed upon by the employer and the employee. The basic rate remains constant from workweek to workweek, but the employees' wages for each workweek will vary according to the number of overtime hours. We believe that a proper application of a wage plan must contain two important factors. First, there must be some agreement or understanding between the employer and the employee establishing the basic rate before performance of the work. Second, any overtime hours must be compensated at not less than one and one-half times the basic rate.

If an employer invokes a wage plan exception, then he has the burden of affirmatively showing that each of the essential conditions to the exception are met. *Foremost Dairies, Inc. v. Wirtz*, 381 F.2d 653, 656 n.4 (5th Cir.1967) *cert. denied* 390 U.S. 946, 88 S.Ct. 1031, 19 L.Ed.2d 1134 (1968). It has been held " . . . that this Act [FLSA] is to be interpreted liberally with exceptions narrowly construed against those seeking to assert them." *Wirtz v. Jernigan*, 405 F.2d 155, 158 (5th Cir.1968) citing *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S.Ct. 453,

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[4] Norman alleges Jerome Cobb, Jimmy McDaniel, Mark Feather, Paul Lott, Edgar Morales, and Darryl Sheppart were under such agreements.

456, 4 L.Ed.2d 393 (1960); *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295-296, 79 S.Ct. 756, 759-760, 3 L.Ed.2d 815 (1959).

[2] Paul Lott's testimony indicates he simply had an agreement to work 55 hours and to be paid $325 a week.[5] He never stated it was his understanding that he would be paid a certain amount for the first 40 hours and one and one-half times that amount for the additional 15 hours. Norman testified to the contrary. The district court was again left with a credibility determination; we do not believe it was clearly erroneous.

[3] A second employee to testify to a wage agreement was Edgar Morales. On direct testimony Mr. Morales states:

* * * * *

(by Rafael Batine)

Q. Were you a salaried employee or were you an hourly employee?

A. Okay. I was paid for forty hours. I was – my pay was salary, lets say, because I worked forty hours regular time; and overtime, I was not to work over fifty hours.

* * * * *

On Cross examination Mr. Morales states:

(by William C. Andrews)

Q. I am going to show you the government exhibit number 1, and ask you to look at the week ending March 25, and you were paid $160. Was that for forty hours?

A. That is for the forty hours. Right.

Q. And then there was $60 overtime?

---

[5] Mr. Lott stated he was to be paid $330 a week but this was not in issue.

A. Overtime.

Q. So that would mean you were being paid $4.00 an hour straight time and $6.00 an hour overtime; is that correct?

A. Yes.

* * * * *

Q. Down on September 2nd, it looks like that your – it went from $160 on your straight time column, to $247. Why did that increase, do you recall?

A. Okay. Yes, the increase was that I was going to work – I worked the same amount of hours, that is right. I got a raise, that is right.

Q. You got a raise?

A. Yes.

* * * * *

Q. But you were still working under the same arrangement that you had right?

A. Right.

There is sufficient evidence to establish that the wage agreement did exist between the Normans and Mr. Morales.

As to the remaining employees,[6] the only evidence of a wage agreement was the testimony of David and India Norman. We have previously identified two factors necessary for the wage agreement to be valid: (1) an agreement and (2) a proper compensation rate. The district court simply found insufficient evidence to support the existence of any agreement based principally upon discrediting the Norman's testimony. After reviewing the entire testimony of the Normans, we believe the district court's decision to discredit their testimony not to be clearly erroneous.

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[6] Jerome Cobb, Jimmy McDaniel, Mark Feather, and Darrell Sheppard.

[4] Norman next contends the district court erroneously placed the burden of proof on them and adopted unreasonable estimates of allegedly uncompensated wages. We disagree.

It is firmly established where an employer has not kept adequate records of their employee's wages and hours as required by the FLSA, the employees will not be denied a recovery of back wages on the ground that their uncompensated work cannot be precisely determined. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687, 66 S.Ct. 1187, 1192, 90 L.Ed. 1515 (1946); *Olson v. Superior Pontiac*, 765 F.2d 1570, 1578 (11th Cir.1985); *Donovan v. Grantham*, 690 F.2d 453, 458 (5th Cir.1982); *Donovan v. Hamm's Drive-Inn*, 661 F.2d 316, 318 (5th Cir.1981). The district court in determining the award to be compensated certainly has a great deal of discretion in determining the most accurate amount to be awarded. In many situations when FLSA claims are made against employers, there are inaccurate or inadequate records maintained as to each employee. Under these circumstances, the district court will look to the litigants for assistance. Brock offered the testimony and calculations of the compliance officer to assist the district court. "[I]t is for the trial judge to determine from all he has and sees the weight to be accorded the compliance officers computations . . . " *Hodgson v. American Concrete Construction Co., Inc.*, 471 F.2d 1183, 1186 (6th Cir.1973). The employee, in the event an employer fails to keep accurate records, need only show "he has in fact performed work for which he was improperly compensated and . . . produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Mt. Clemens*, at 687, 66 S.Ct. at 1192. The fact that several employees do not testify does not penalize their claim; "it is clear that each employee need not testify in order to make out a prima facie case of the number of hours worked as a matter of 'just and reasonable inference'." *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 472 (11th Cir. 1982) citing *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir.1973).

In the present case, there is at most a substantial amount of conflicting evidence. The trial court had the opportunity to judge credibility of the witnesses and in doing so, discredited the

testimony of the Normans. This court "does not sit to retry cases from the district court." *Brennan v. City Stores, Inc.*, 479 F.2d 235, 238 (5th Cir. 1973). Stanton Morgan, compliance officer, provided the court with estimates as to the hours worked of each employee and wages owed to each employee. The district court accepted these calculations for its use in determining exactly which employee was owed what amount.

We do not believe the district court erroneously placed the burden of proof on Norman and we do not believe the calculations adopted by the court for its own use to be an unreasonable estimate of the uncompensated wages.

[5] Norman next contends the record does not support the findings that they coerced five employees to return their checks awarded following the consent judgment entered into on September 12, 1982 following charges brought against Norman for violations of the FLSA. We disagree.

Brock alleged five employees were coerced into returning their back wage checks: Kenneth Lott, Lula Mae Clayton, Darrell Sheppard, Joseph Upshaw and Andrew Strickland. Mr. Strickland did not testify, but the other four employees did. All but Lott, testified that they wanted to donate their money to the Highlands Missionary Baptist Church where the Normans were members. Mr. Norman testified that he had been approached by the employees and told that they did not want to keep the money because they did not believe it was theirs and would rather return the money. At Mr. Norman's suggestion they agreed to donate the money to the Highlands Missionary Baptist Church.

Mr. Lott testified that he returned his money after Mr. Norman told him that the reason he was getting the silent treatment and had not received a raise was because he had not returned his check. Mr. Lott had his wife withdraw the amount of his back wage check, so he could return it to Mr. Norman. Mr. Lott was not aware that this money was going to any church.

Mr. Norman also testified that his only involvement was that of a courier. He merely delivered the money on behalf of the

employees to the church. However, John W. Dean, treasurer of the Highlands Missionary Baptist Church, testified that the extent of his knowledge was that Mr. Norman brought in two donations of $5,719.68 and $2,978.05 in cash. that Mr. Norman did not specify whether he and Mrs. Norman were making the donations or anyone else.

The district court essentially heard conflicting evidence and concluded to discredit the testimony of Mr. Norman and the three employees, and accept the testimony of Mr. Lott. The district court's decision was not clearly erroneous.

Norman's final point of error is that there is no evidence to support the district court's findings of retaliatory discharges. We disagree.

[6] The burden of proof is on Brock to establish a retaliatory discharge *Le Compte v. Chrysler Credit Corp.*, 780 F.2d 1260, 1264 (5th Cir.1986). Brock alledged Inez Congleton and Ben Usher were discharged for their failure to return back wage checks. The Normans testified that Ms. Congleton quit her job after a heated discussion about her job performance.

Inez Congleton stated she was called up to the Norman's offices and asked what she intended to do with the back wage check she received; her response was that she put it into her bank. Mrs. Norman then told Mrs. Congleton to go get her cash drawer from her register which she did. Mrs. Congleton turned her drawer over to Mrs. Norman, which she perceived as being fired.

Ben Usher, according to the Normans, was an independent contractor and not an employee, who was fired because of poor job performance. The district court found that Mr. Usher had been sent by the Normans to obtain a janitor's license; despite the license, Mr. Usher's work duties did not change. The trial court concluded "the acquisition of a license by Usher did not make him a contractor, he remained an employee of Norman's Country Market and continued performing the same duties." We agree. Mr. Usher stated he could not read or write, but he could sign his name, and that Mr. Norman told him to go get

a license to " . . . scrub and wax the floor." He stated he didn't know what it meant but he was going to do it because Mr. Norman told him so. Mr. Usher stated he had a conversation with the Normans immediately following Mr. Usher's cashing of his back wage check. The Normans told him that they had lost confidence in him, that he lied and was no longer needed. The district court again made a credibility determination.

There was sufficient evidence from which the district court could have believed that a retaliatory discharge had occurred against Mrs. Congleton and Mr. Usher.

The district court's decision is, therefore, AFFIRMED except as to the claim of Mr. Edgar Morales for working in violation of an invalid wage agreement, which finding is hereby REVERSED and the Court below is ordered to amend its judgment in this respect.

Appended Statutes, Constitutional Provisions and Regulations Involved

The Fifth Amendment to the United States Constitution (U.S. Const., Amend. V) provides in pertinent part:

> No person shall be deprived of life, liberty, or property, without due process of law.

The exemption provision of the Fair Labor Standards Act (29 U.S.C. § 213 (a)) provides in pertinent part:

> The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to:
>
> (1) any employee employed in a bona fide executive . . . capacity.

The Code of Federal Regulations provides in pertinent part:

> The term "employee employed in a bona fide executive . . . capacity" in section 13(a)(1) of the Act shall mean any employee:
>
> (a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and
>
> (b) Who customarily and regularly directs the work of two or more other employees therein; and
>
> (c) Who has the authority to hire or fire other employees or whose suggestion and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and
>
> (d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: "Provided", That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20-percent interest in the enterprise in which he is employed; and

(f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week (or $130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: "Provided", That an employee who is compensated on a salary basis at a rate of not less than $250 per week (or $200 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section (29 C.F.R. § 541.1).

and

A determination of whether an employee has management as his primary duty must be based on all the facts in a particular case. The amount of time spent in the performance of the

managerial duties is a useful guide in determining whether management is the primary duty of an employee. In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the employee's time. Thus, an employee who spends over 50 percent of his time in management would have management as his primary duty. Time alone, however, is not the sole test, and in situations where the employee does not spend over 50 percent of his time in managerial duties, he might nevertheless have management as his primary duty if the other pertinent factors support such a conclusion. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, his relative freedom from supervision, and the relationship between his salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor. For example, in some departments, or subdivisions of an establishment, an employee has broad responsibilities similar to those of the owner or manager of the establishment, but generally spends more than 50 percent of his time in production or sales work. While engaged in such work he supervises other employees, directs the work of warehouse and delivery men, approves advertising, orders merchandise, handles customer complaints, authorizes payment of bills, or performs other management duties as the day-to-day operations require. He will be considered to have management as his primary duty. In the data processing field an employee who directs the day-to-day activities of a single group of programers and who performs the more complex or responsible jobs in programing will be considered to have management as his primary duty (29 C.F.R. § 541.103).

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

CASE No. GCA 81-0049-MMP

RAYMOND J. DONOVAN,

v

NORMAN'S COUNTRY MARKET, INC.,
DAVID A. NORMAN AND INDIA A. NORMAN,

JUDGMENT IN A CIVIL CASE

☒ **Decision by Court.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment is entered against defendants Norman's Country Market, Inc., David A. Norman and India A. Norman in the amount of Four Thousand Two Hundred Ninety Five Dollars and Thirty Eight Cents ($4,295.38) for costs, fees and expenses and Three Thousand Seven Hundred Thirty Two Dollars and Ninety Three Cents ($3,732.93) for the prosecution of this civil contempt action, for a total of Eight Thousand Twenty Eight Dollars and Thirty One Cents ($8,028.31), and in favor of the plaintiff, Secretary of Labor.

February 23, 1987
Date:

MARVIN S. WAITS
Clerk

/s/Ginger Channing
(By) Deputy Clerk